No. 2365

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLAF LIE, master of the Norwegian steamship "Selja", on behalf of himself and the owners, officers and crew of said steamship,

Appellant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, claimant of the American steamship "Beaver",

Appellee.

MEMORANDUM

As to a Recent Unreported Decision of the Second Circuit, Considering Facts Analogous to Those Here and Sustaining the Pennsylvania "but for" Rule in Collision Cases.

WILLIAM DENMAN,
IRA A. CAMPBELL,
Proctors for Appellee.

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As to a Recent Unreported Decision of the Second Circuit, Considering Facts Analogous to Those Here and Sustaining the Pennsylvania "but for" Rule in Collision Cases.

The Circuit Court of Appeals for the Second Circuit has just rendered a decision in a collision case, sustaining the "but for" rule in the Pennsylvania case, in which the facts are so analagous to the case at bar that

it should certainly receive attention in any opinion rendered by this Court. The case is entitled

> Yang-Tsze Insurance Ass. v. Furness, Withy & Co., No. 201, Oct. Term, 1913.

The facts in that case are that the steamer Alleghany, proceeding on a southerly course in broad daylight, and for three-quarters of an hour in clear sight of the steamer Pomaron, which was sailing on an easterly course some ten or twelve miles away, failed to see the Pomaron until the vessels were within a mile apart. The Alleghany had no lookout, and the officer on her bridge had gone into the chartroom and was calculating his position during this entire time, that is, for three-quarters of an hour. This extraordinary negligence by the Alleghany was characterized by the Court as follows:

> "That the negligence of the Alleghany was inexcusable and even unparallelled, seemed to be admitted. The vessel was under the command of one of the best officers the Hamburg line had in its service. But he had no idea that there was any vessel anywhere in his vicinity. And for three-quarters of an hour prior to the collision there was no lookout."

As with the Beaver, the owners of the Alleghany admitted liability but insisted on a division of damages, on the ground that the approaching Pomaron had violated a statutory rule and must hence be held liable under the principles of the "Pennsylvania" case.

The fault of the Pomaron was of relatively minor import, if there ever was any occasion for applying the so-called major and minor fault rule. It was committed

in broad daylight, when the vessels were a mile apart, and between five and seven minutes before the collision, that is to say, about the same time prior to the collision that the ninth violation of the stop engine rule, while in the fog, was committed by the Selja. The fault of the Pomaron consisted in porting her helm and turning to starboard, away from the approaching Alleghany. The reason for this change and violation of the rule which compels a vessel in the Pomaron's position to keep her course and speed, was that the officer in charge of the Pomaron saw no one on the bridge of the Alleghany and (rightly) concluded that the other vessel was unaware of his presence.

Speaking of the relative intensity of the faults of the two vessels, District Judge Hand says:

> "The case is one which shows the necessity for the proposed new rule which will not hold each ship in solido, but will apportion liability acocrding to fault. Had this been open to me, I should have attributed a very small fraction of blame, indeed, to the Pomaron. As it is, under what I cannot help calling a very mechanical and arbitrary rule of law, I see no escape from assessing this ship with the full loss for a trifling violation of the rule, for it remains true, however we may regret the result, that only unfounded speculation can justify us in saying that the violation could not have produced the collision."

The striking thing here, as far as the facts are concerned, is that the light fault of the Pomaron occurred while the vessels were from five to seven minutes apart, in *broad daylight,* while the statutory violations of the Selja continued nine times and up to six minutes of the

collision *in a dense fog*. The nine faults of the Selja, committed when her captain could not possibly have known where his opponent was, certainly constitute a vastly graver offense than the one fault of the Pomaron, which had at least some semblance of an excuse. In both cases the forces arising out of the violation of the rule continued till the vessels were in extremis, the Selja at right angles square across the course of the Beaver, the Pomaron turning into the side of the ~~Pennsylvania~~ Alleghany.

Physically the offenses were exactly opposite in effect. If the Pomaron had obeyed the rule and kept her course and speed, she would have *passed by* the point of intersection of the two courses *before* the Alleghany reached it. If the Selja had obeyed the rule and stopped her engines, she would have taken a longer time in approaching the Beaver (during which time the Beaver might have heard more of her whistles), and she would not have reached the point of intersection till *after* the Beaver reached it. In both cases the violation of the statute was the *causa sine qua non* of the collision.

The Circuit Court of Appeals affirms Judge Hand's decision. It holds that the Pomaron violated rule 21, requiring her to keep her course and speed, in thus porting her helm between five and seven minutes before the collision.

It then resolves the question whether this violation of the rule contributed to the collision and cites the rule in the Pennsylvania case, which we have relied upon in our briefs, and as subsequently reaffirmed in Belden v. Chase, 150 U. S. 674. The Court of Appeals say:

> "The principle thus laid down that when a ship at the time of the collision is acting in violation of a statutory rule the burden is on her to show not merely that her fault might not have been one of the causes, or that it probably was not, but *that it could not have been one of the causes of the collision, has been reaffirmed in subsequent cases and is the law beyond all controversy.*"

Having thus recognized the rule, the Court proceeds to apply it exactly in the way that we have applied it in the opening pages of our brief. That is to say, it first states the problem for the particular case in the terms of the "but for" rule:

> "But whether the collision would or would not have occurred if the Pomaron had held her course and speed cannot now possibly be determined because of the doubt which exists as to the exact bearing of the Alleghany from the Pomaron at the time."

The Court does not say, Was the failure of the Pomaron to keep her course and speed the *proximate cause* of the collision? but, Would or would not the collision have occurred but for the failure of the Pomaron to hold her course and speed?

In determining whether the collision would or would not have occurred, it applies the principle illustrated in the diagram on page 9 of our larger green brief; that is to say, the Court says, after reviewing the courses of the vessels:

> "It can readily be ascertained by applying the speed ratios, *whether the intersection of the known courses would be coincident,* whether or not the two vessels would come together."

In another place it says:

> "If the Alleghany did bear northwesterly and was three points on the Pomaron's port bow, and the latter changed her course, it is a demonstrable proposition that a collision would not have occurred if both vessels had continued on as they were, neither one changing her course."

The decision is a complete answer to the argument on behalf of the Selja, viz., that because one party admits a serious fault, the "but for" rule of the Pennsylvania case does not apply in determining whether the proven fault of the opposing vessel contributed to the collision. The Court considers itself entirely free from the question of proximity causation in determining whether or not the offending vessel, though committing what is manifestly a minor fault, should be held liable for its share of the damages.

The decision is also a complete answer to our opponent's contention that the phrase "time of collision" as used in the Pennsylvania rule means at the moment of impact. Here the time of the collision is held to cover an act committed from five to seven minutes before the collision.

It also answers the contention that where a specific statutory rule is violated, the test of liability is not whether the course and speed of the violating vessel would have brought her to the colliding point if the law had been obeyed. The Court squarely bases its decision on the ground that the offending vessel has not shown that the vessels would not have reached the crossing point at the same time, if the violation had not occurred.

We thus have the following Circuit Courts of Appeal all agreeing with Judge Bean that the "but for" rule of the Pennsylvania case applies to vessels violating statutory rules of the road:

First Circuit (1905): Admiral Schley, 142 Fed. 67;
Second Circuit (1914): Yang-Tsze Ins. Co. v. Furness, Withy & Co. (Pomaron case, supra);
Fourth Circuit (1901): Merchants Trans. Co. v. Hopkins, 108 Fed. 890, 894;
Fifth Circuit (1907): The Ellis, 152 Fed. 981;
Sixth Circuit (1909): Hawgood Transit Co. v. Mesaba SS. Co., 166 Fed. 697 at 702.

"But for" the violations by the Selja of the "stop engine" rule, admitted in her libel, the collision would not have occurred. At her reduced speed she would not have reached the point of intersection till the Beaver passed on. The Beaver would have had longer time to have heard her whistles, and it cannot be said that this could not possibly have contributed to the collision. To hold her free from liability would mean to overrule all these other circuits and the Supreme Court decisions in the Pennsylvania and Martello v. The Willey, on which they rest.

The Pomaron, in its brief on appeal, in part based its argument against the "but for" rule on the decision of the same Court in the "St. Louis", 98 Fed. 750, and the Europe, 190 Fed. 475, which it offered in opposition to the "Beaver" decision (this case) in the Court below. The question of major and minor fault was also discussed fully by Messrs. Burlingham, Kirlin and Harrison, leaders of the New York Admiralty bar.

The decisions of the Circuit Court of Appeals and of Judge Hand are printed in full hereafter. (The italics and caps are ours.)

Respectfully submitted,

WILLIAM DENMAN,
IRA A. CAMPBELL,
Proctors for Appellee.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

Before—LACOMBE, WARD and ROGERS. YANG-TSZE INSURANCE ASSOCIATION, LIMITED, *et al.*, Libelants-Appellees, vs. FURNESS, WITHY AND COMPANY, LIMITED, Respondent-Appellant.	October Term 1913 No. 201

Burlingham, Montgomery and Beecher, Proctors for Appellant; Charles C. Burlingham, Norman B. Beecher, Robinson Leech, Counsel.

Convers and Kirlin, Proctors for Appellees; J. Parker Kirlin, William H. McGrann, Advocates.

Harrington, Bigham and Englar, Proctors for Libellants-Appellees; Eugene J. Coleman, *et al.*, Howard S. Harrington, Advocate.

Kneeland, Harrison and Hewitt, Proctors for Appellee; Lawrence Kneeland, Counsel.

This cause comes here upon appeal to review a decree of the District Court of the United States for the Southern District of New York in favor of certain owners and underwriters of cargo of the German Steamship *Alleghany* for damages resulting from the total loss of the cargo as the result of a collision with the *Pomaron* on February 2, 1912.

The original libels were filed against the owners of the two vessels jointly. But the Hamburg-American

Company, the owner of the *Alleghany,* filed a petition for the limitation of its liability and surrendered the amount of its pending freight for the voyage and the libels were thereupon stayed as to that company.

ROGERS, Circuit Judge:

Furness, Withy & Company, Ltd., a corporation created by and existing under the laws of the United Kingdom of Great Britain and Ireland prosecutes this appeal to reverse a decree of the court below. Fifteen separate libels were filed against the above named corporation. The separate libelants were: Yang-Tsze Insurance Association, Ltd., *et al.;* Nord-Deutsche Insurance Company, *et al.;* Federal Insurance Company; Walter Oloffson, *et al.;* M. H. Silvera; Hazen and Company; Boston Insurance Company; Walter Despard; Eugene J. F. Coleman; Marshall K. Weidensaul; Frances W. Van Praag; Orton G. Orr; Laura Moore; Louis Bertschman; United States of America. The various libelants brought suits for cargo losses except the United States. The Government suit was for loss of registered mail carried by the Steamship *Alleghany* which sank at sea because of a collision with the Steamship *Pomaron,* and the suits were brought against the owners of the latter vessel. The suits were brought on for trial simultaneously having been consolidated, and heard on the pleadings and proofs. The court below rendered a decision that the libelants were entitled to recover. One decree was entered awarding in all, damages and costs amounting to $172,029.81.

This collision occurred off the capes of Virginia about 11:30 A. M. on February 2, 1912. The *Alleghany* was on a voyage from New York to the West Indies. The vessel was an ordinary tramp steamer, 310 feet long. The *Pomaron* was a steel screw steamship of 1809 tons gross and 1027 tons net, 278 feet long, and belonged to Furness, Withy & Company, Ltd. She was on her way from Baltimore to European ports and loaded with grain and general cargo. The *Pomaron* sighted the *Alleghany* about an hour before the accident, the latter being some ten or twelve miles away and on her port hand. Each vessel kept her course and speed for some forty-five minutes. During that time the chief officer of the *Pomaron* had the *Alleghany* under constant observation. But during this time the *Alleghany* had not seen the *Pomaron* at all. This was occasioned by the fact that her chief officer, then on watch, had taken his observation and gone into the chart room to calculate his position. *The Alleghany did not discover the Pomaron until the latter blew one blast on her whistle and ported her helm. This was between five and seven minutes of the collision.* Between the time when the *Pomaron* saw the *Alleghany* and the time when she blew the blast on her whistle the two vessels had continued to approach each other without change of course or speed. At the time the *Pomaron* sounded her whistle the two vessels *were about a mile apart* and the *Alleghany* was proceeding at a speed of 11½ knots per hour and the *Pomaron* at a speed of 9 knots. After the *Pomaron* sounded her whistle the *Alleghany* shortly blew two blasts and thereupon the chief officer of the *Pomaron* at

once rang the engines full speed astern and ordered the helm hard-a-port. He testified that after he had rung full speed astern he saw the *Alleghany* had put her helm hard-a-starboard and he could see "she was swinging around, her stern was flying into us and of course, when he put his helm hard-a-starboard, his stern swung around and caught us on the bow, about abreast of No. 3 hatch." The bow of the *Pomaron* struck the starboard quarter of the *Alleghany* about 100 feet from her stern and about 3 o'clock in the afternoon the *Alleghany* sank. Before the collision the *Alleghany* was on a course approximately south and the *Pomaron* was on a course approximately east, the vessels being on crossing courses and the *Alleghany* having the *Pomaron* on her starboard hand. As the two vessels were on crossing courses they were subject to Article 19 of the International Regulations. That article is as follows:

> "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other."

And Article 21 provides:

> "Where, by any of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed."

The *Pomaron* was to the southward and westward of the *Alleghany* and on the latter's starboard hand as the two vessels approached each other. These respective courses had been maintained for several hours prior to the collision, and the two vessels were about a mile apart when the *Pomaron,* the privileged vessel, changed

her course to starboard. In doing so she failed to comply with Article 21. The *Pomaron* seeks to excuse its porting under Article 27. That Article is as follows:

> "In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

It becomes necessary, therefore, to inquire whether the special circumstances as they existed at the time the *Pomaron* altered her course was justified under Article 27.

The application of rule 27 is restricted by its terms to situations of immediate danger. That rule applies only to exceptional cases. As said by the Supreme Court in *The Oregon,* 158 U. S., 186, 202, exceptions to the rules are to be admitted "with great caution and only when imperatively required by special circumstances of the case. It follows that, under all ordinary circumstances, a vessel discharges her full duty and obligation to another by a faithful and literal observance of these rules." In Marsden's Collisions at Sea, 6th ed., p. 455 it is said:

> "But Article 27 applies only to cases where 'there is immediate danger, perfectly clear'; and the departure from the rules must be no more than is necessary."

The 'special circumstances' apparently relied upon to excuse the *Pomaron* under Article 27 is the testimony of the officer in charge of the vessel that he could see

no one on the bridge of the *Alleghany.* And attention is called to the doctrine of the Supreme Court in *The Delaware,* 161 U. S., 459, where it is said:

> "The weight of English, and perhaps of American authorities, is to the effect that if the master of the preferred steamer has any reason to believe that the other will not take measures to keep out of her way, he must treat this as a 'special circumstance" under Rule 24 (now Rule 27), 'rendering a departure' from the rules 'necessary to avoid immediate danger.' "

And the officer in charge of the *Pomaron* insisted that the change in the *Pomaron's* course did not cause the collision. His testimony was as follows:

> "Q. What was the danger? A. I saw if he was going to keep on the way he was doing he would catch us somewhere about the engine room.
>
> Q. If you had maintained your course he would have struck you near the engine room? A. Yes, about midships.
>
> Q. If you had both maintained the courses you were on then without change, what do you think would have happened? A. He would have run right into us amidships.
>
> Q. Are you sure of that? A. Yes.
>
> Q. Wouldn't he have got across your bow? A. No, sir; couldn't have done it.
>
> Q. Could you have possibly got across his bow? A. No." And on cross-examination he was asked, "do you think collision would have happened if you had not ported your helm? A. Yes, it would have happened in any case; she would have caught us somewhere probably about amidships if I had not ported."

But there can be no doubt that it was the duty of the *Pomaron* to have kept on her course until a departure was necessary to avoid immediate danger. At the time

she ported her helm she was a mile away from the *Alleghany,* and the circumstances had not yet developed which justified any departure from the established rules. Her chief officer was asked: "In order to get the matter quite plain on the record, will you tell us when it was that in your judgment the circumstances had developed so that collision became unavoidable unless you did something?" To which he replied: "Really not until the *Alleghany* had given me two blasts on the whistle." At that time the two vessels were, according to his testimony, half a mile away from each other. He testified that up to that time he had appreciated risk of collision, but thought it might have been avoided by the other vessel. He then asked: "Then it became under the rule your duty to do something." And he answered, "Yes." "It had not been your duty to do anything before that?" To which he replied, "No, sir." It is established, therefore, upon the testimony of the chief officer of the *Pomaron* that he departed from the rule before it was necessary for him to do something to avoid an otherwise unavoidable collision.

We are obliged, therefore, to hold that the *Pomaron* not only violated Article 21, but that in doing so was not excused under Article 27. Concluding then, as we have, that the *Pomaron* was in fault, it remains to inquire whether the fault contributed to the collision. For if the fault had nothing to do with the collision it may be disregarded. The law unquestionably is that in cases of collision liability for damages rests upon the ship or ships whose fault occasioned the injury. And in considering whether this fault of the *Pomaron* con-

tributed to the collision it is necessary to keep in mind the rule laid down by the Supreme Court in *The Pennsylvania,* 19 Wallace 125, 136 (1893), where the Court said:

> "But, when as in this case, a ship at the time of the collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the Statute."

The principle thus laid down that when a ship at the time of the collision is acting in violation of a statutory rule the burden is on her to show not merely that her fault might not have been one of the causes, or that it probably was not but that *it could not have been one of the causes of the collision has been reaffirmed in subsequent cases and* **is the law beyond all controversy.**

> Richelieu Navigation Company, 136 U. S. 408, 422, 423 (1890); Belden v. Chase, 150 U. S. 674, 699 (1893).

And the same rule is established in the English Courts. *The Agra,* L. R. 1 P. C. 501, 504, 505. *The Elizabeth Jenkins,* L. R. 1 P. C. App. 501. Under these decisions the burden of proof rests upon the *Pomaron* to show that the fault she committed could not have been one of the causes of the collision.

But whether the collision would or would not have occurred if the Pomaron had held her course and speed cannot now possibly be determined because of the doubt which exists as to the exact bearing of the *Alleghany* from the *Pomaron* at the time. The bearing entered in the *Pomaron's* log is "about northeast", but both her chief officer and her wheelsman have testified that this is not correct, and that the bearing was between four and five points, nearer five than four. But the officer of the *Pomaron* for some inconceivable reason contented himself after his discovery of the *Alleghany* with one hasty sight over the compass to ascertain whether or not the bearing of the *Alleghany* was changing. He admitted that he watched the bearing of the *Alleghany* "just roughly" and that he "didn't bother to take any bearings at all", and that the *Alleghany's* bearing might have been more or it might have been less than three points if he "had taken a correct bearing". He is not to be excused for his failure to take correct bearings and should have taken several correct bearings during the forty-six minutes which elapsed from first sighting the *Alleghany* to the collision, or during the thirty-nine minutes from first sighting her to his change of course. Asked as to whether he took the bearing by the compass, he replied: "It was not a proper compass bearing; I just glanced over the top of the compass and took a rough bearing." Then he was asked: "It was not a guess, you looked at the compass?" To this he answered: "It was not a true bearing, not an accurate bearing." He also testified that at that time the *Alleghany* was bearing north-

east and was three points or more on his port bow. The *Alleghany* remained on her original course until just before the collision. Whether she changed just before the collision is not free from doubt. The officer of the *Alleghany* who was on watch at the time says that "no commands were given to the steersman of the *Alleghany*", although the chief officer of the *Pomaron* states that the *Alleghany* swung under a starboard helm. If the *Alleghany* did bear northeast and was three points on the *Pomaron's* port bow when the latter changed course it is a demonstrable proposition that a collision would not have occurred if both vessels had continued on as they were, neither one changing her course. It can readily be ascertained by applying the speed ratios whether the intersections of the known courses would be coincident, whether or not the two vessels would come together. If the *Alleghany* was three points on the *Pomaron's* port bow and had not changed her speed or course she would have passed the point where the two courses intersected safely and some seconds before the *Alleghany* reached it. And if as some of the testimony indicated the *Alleghany* was five points on the *Pomaron's* port bow the *Alleghany* would have passed the point of intersection about two minutes before the *Pomaron* reached it. But in reality the contradictions in the testimony as to what the actual bearing of the vessels was makes it impossible to demonstrate whether or not any change at all in the *Pomaron's* course or speed was necessary to avoid collision. We have already cited the opinion of the chief officer of the *Pomaron* that the collision would have happened if neither vessel

had not changed. But we cannot accept his testimony on the point as conclusive. He estimated that the *Alleghany* was making thirteen knots and this according to his report to the Board of Trade was a knot and a half more than she was making. This would make a difference of 750 feet in the *Alleghany's* position in the five minutes which elapsed between the first porting and the collision.

The loss of property for which a recovery is sought was due to a collision on the high seas, in broad daylight and in clear weather and with no other vessels about to embarrass or interfere with navigation. The two vessels involved were steamers and, therefore, could be manoeuvred more easily than any other kind of vessels. They were in plain sight of each other when miles apart. They nevertheless came into collision and with such force that one of them sank in a few hours, carrying down with her the entire cargo. It is difficult to see how it all happened unless both vessels were in fault and failed to exercise reasonable care. Plain common sense constrains one to such a conclusion. To exonerate either of them under such conditions can be justified only if upon the closest scrutiny of the navigation of each vessel it can be discovered that one of them was free from all culpable blame. We have examined the evidence in the case with care and we have not been satisfied that either one of these vessels was free from fault. The vessels that navigate the high seas and indeed vessels that navigate inland waters, entrusted with human lives and property of great value must be held to the strictest standards of conduct, and when

they fail to observe the requirements which the maritime law of the nations has prescribed are to understand that they must abide the consequences.

That the negligence of the *Alleghany* was inexcusable and even unparalled, seemed to be admitted. The vessel was under the command of one of the best officers the Hamburg line had in its service. But he had no idea that there was any vessel anywhere in his vicinity. And for three-quarters of an hour prior to the collision there was no lookout. The owners of that vessel filed a petition for limitation of liability and surrendered the amount of the freight for the voyage.

The Court below assessed the *Pomaron* with the full loss while stating that the case was one "which shows the necessity for the proposed new rule which will not hold each ship *in solido* but will apportion liability according to fault". And it was urged upon us in argument that the Court erred in not apportioning the damages in accordance with the degree of fault. Attention was called to the fact that the *Alleghany* was a German vessel and that her cargo, for the loss of which the suit was brought, was shipped under bills of lading issued by the Hamburg-American Line, a corporation organized under the laws of the German Empire. And as the *Pomaron* was a British vessel it is said it was the duty of the Court to have taken judicial notice of the fact that by the Maritime Conventions Act (land 2 Geo. V. C. 57) the English rule as to division of loss by collision due to mutual fault was modified in accordance with the convention signed at the Brussels Conference in 1910. In like manner it is said that judicial notice should have

been taken of §735 of the Commercial Code of Germany of May 10, 1897, which reads as follows:

> "If the collision is caused by faults of both sides, then the liability for damages, as well as the amount of the damages to be paid, depends on the circumstances, especially to what extent the collision has been caused by the prevailing fault of the members of one or the other crew."

It may be that at the time when this collision occurred the laws of Great Britain and Germany coincided in providing that the liability for damages is to be in proportion to the degree in which each vessel is in fault. If the foreign law had been pleaded and proved, the Court had assessed the damages in accordance with it, there would have been some authority for so doing. * * * (Discussion of proof of foreign law.) * * *

We do not wish, however, to be understood as intimating in what we have said that even if the foreign law had been pleaded the Court could have assessed the damages according to the principle adopted by statute in Great Britain and in Germany. Whether it could or could not have done so is not now before us. And we do not find it necessary under the facts disclosed in the present record to consider how the decision of the Supreme Court in *The Oceanic Steam Navigation Company, Limited v. Mellor,* announced May 25th, 1914, and not yet reported affects the question.

Decree affirmed.

United States District Court, Southern District of New York.

The Federal Insurance Company,
against
Furness, Withy & Co., Ltd.

Eugene J. F. Coleman and others,
against
Furness, Withy & Co., Ltd.

Nord-Deutscher Insurance Co.,
against
Furness, Withy & Co., Ltd.

Yang-tse Insurance Co., Ltd., et al.,
against
Furness, Withy & Co., Ltd.

This is a suit in admiralty arising out of a collision on the high seas on February second, 1912, at about half past eleven in the forenoon some one hundred miles off the Chesapeake Capes, between the steamer Alleghany (sic) and the steamer Pomaron. The libelants in the case represent the cargo of the Alleghany which was sunk by the collision, and the suit is between them and the owners of the Pomaron. The weather was clear, the wind and sea moderate. The Alleghany, an ordinary tramp steamer, three hundred and ten feet long, had left New York the previous

night, bound for the West Indies, and was then on a course south two degrees west true, at a speed of almost exactly eleven and one-half knots an hour. The Pomaron, a similar steamer, two hundred and seventy-eight feet long, had left Baltimore February first at seven a. m. and was on a course east nineteen degrees north true, at a speed of about nine knots. The collision occurred about one hundred and ten miles outside of Cape Henry in thirty-seven degrees twenty-six minutes north and seventy-three degrees and forty-two minutes west. These facts are all conceded. From them it results that the angle between the courses of the vessels was one hundred and eleven degrees. The Pomaron sighted the Alleghany at about ten thirty, some ten or twelve miles away on her port hand, the exact bearing being one of the points in dispute. Each vessel kept her course and speed for about forty-five minutes. During that time the chief officer of the Pomaron had constantly observed the Alleghany, and taken her bearing roughly over his compass, which he made about northeast. The Alleghany had not, however, seen the Pomaron at all. This was due to the fact that the chief officer, then on watch, had taken his observation and gone into the chart room to calculate his position. As the wind was from the west, there were dodgers upon the starboard end of the Alleghany's bridge, and either these or the situation of the quartermaster at the wheel, prevented him from seeing off on his starboard hand. No lookout was kept, and the quartermaster was steering by a course, the result being that the Alleghany did not see the Pomaron until the Pomaron herself blew. The Pomaron's chief

master, Westgarth, kept his course and speed as required by the twenty-first article of the International Rules, until a time which he places variously between five and seven minutes of the collision. Then he blew one blast and directed his quartermaster to port his wheel a little. The only testimony of the amount of this porting comes from the testimony of Westgarth and the quartermaster, which shows that at the end of the time the ship had changed her heading one point to starboard. They and the boatswain place the period at one minute. Meanwhile the Alleghany had kept her courts and speed unaltered, although the giving-way vessel. At the end of the period, whatever it was, the Alleghany blew two blasts, and put her wheel hard-a-starboard. At that moment, or soon thereafter, the Pomaron hard-a-ported and telegraphed to her engine-room "full speed astern". This order was executed in the engineroom in about half a minute, perhaps less, as her engineer testified, and she continued under reversed engines until the collision. The time between the reversal of the engine and the collision is stated by the engineer to have been three minutes and a half. This he says he observed upon the clock in the engine-room opposite which he faced. Both the chief officer and the quartermaster agree that the time between the Alleghany's whistle and the collision was four minutes. All the Pomaron's crew agree that the Pomaron had very greatly diminished her speed. The captain of the Alleghany who had come on deck says that the Pomaron had not reversed until the vessels were near enough for him to shout to Westgarth to do so, at which time he put over his telegraph. At the

time of the collision the vessels had changed their headings considerably. The only testimony upon this point is given by Westgarth, who says that the Alleghany was headed southeast by south and the Pomaron east southeast, but that the angle of collision was four points. The bow of the Pomaron struck the starboard quarter of the Alleghany somewhere between hatches three and four, not less than one hundred feet from the stern. The latter was under full speed, and she went on past the Pomaron until her engines were reversed and she stopped. Being badly damaged, she put about for Norfolk, but was found to be in sinking condition a few hours afterwards and her passengers and crew were taken on the Pomaron, which then stood by until the Alleghany sunk, at about three o'clock.

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Harrington, Bigham & Englar Esqs.
(Howard S. Harrington) for Eugene J. F. Coleman, et al.;

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Hand, D. J. The libelants charge three faults against the Pomaron; first, that the vessels are not shown to have been in risk of collision; second, that the Pomaron changed her course before the time mentioned in the Note to Article Twenty-one; third, that her manoeuvres in extremis directly brought her into collision. I have found the case extremely complicated in the facts, but I believe that a sufficiently painstaking analysis of the testimony admits of more certainty than at first appears to be possible. Most of my conclusions as to the distance and bearing of the vessels at different times can be proved by the use of a simple logarithmic table together with the theorem that the sides of a triangle are in proportion to the sides of the opposite angles, but I have not appended the details of the calculations, as they can be easily verified.

The first question to determine is whether the situation was one actually involving risk of collision. This the rules define as one in which the bearing does not appreciably change. We know that the constant bearing which would have brought them into collision, was almost exactly thirty-nine and one-fourth degree or three and one-half points. However, the constancy of the bearing applies only at substantial distances; thus, when the vessels were a half mile apart, the Alleghany might have opened one-half a point and yet when the Pomaron's stern crossed the Alleghany's course the Alleghany's bow would have been only one hundred and sixty-four feet away, much too close a shave. At half a mile apart the Alleghany was in that event one thousand nine hundred and ninety-five feet

from the point of crossing and the Pomaron one thousand one hundred and fifty-six. If on the other hand the Alleghany had closed one-half a point at a distance of half a mile, the Alleghany's stern would clear the Pomaron's course when the latter's bow was only one hundred and seventy feet away, also too close a shave. In that case the Alleghany would have been one thousand five hundred and sixty-six feet from the intersection and the Pomaron one thousand six hundred and thirty-seven feet. Even if the Alleghany had opened a full point, still the Pomaron would have been justified in regarding the case as one involving risk of collision, for her stern would have cleared the Alleghany, a course when the latter was only about six hundred and eighty feet away; and that, in the case of two vessels of the length of these, and moving at their speeds is no more than enough leeway to allow for incorrect estimates of distance and speed. The distances in that case would be respectively two thousand one hundred and eighty-two feet and eight hundred and ninety-seven feet. As nearly as the vessels can be placed from the testimony it will appear that the Alleghany after the Pomaron blew was at least as far away as the Pomaron from the intersection of their courses, and not more than one thousand feet further. At that time, therefore, there was a risk of collision and there could not therefore have been appreciably more than half a point of variation in the bearing from that absolutely constant bearing which would have brought their bows in collision, and which must have existed up to that time. I therefore find that whether or not Westgarth's observation of "about" northeast was careful enough

(it was actually NE ¾ N), the bearing had been in fact substantially constant, that there was in fact risk of collision within the meaning of the rule, and that he was justified in manoeuvring on that assumption. It seems hardly worth while further to elaborate the reality of a danger which everybody who was present thought imminent and certain before the Pomaron backed, and which was at once realized.

The next fault alleged against the Pomaron is her initial porting when the vessels were about one mile apart. This every one agrees was before the period had arrived under the Note to the Twenty-first Article, after which the Alleghany could not alone avoid collision. Under all the authorities it was a clear violation of the rule and imposes on the Pomaron the duty of showing that it could not have contributed to the disaster. The facts are that the Pomaron blew once and ported slightly, that the Alleghany thereupon awoke, her chief officer ran out of the chart room, thought at a glance that it was too late to port, blew two blasts and hard-a-starboarded, that, when the Alleghany blew twice, Westgarth hard-a-ported and gave the order to reverse, and at the end of half a minute did get his engines in reverse till the collision. First, I have to find out how long a time elapsed between the two signals. Westgarth first put it in the log as three minutes but later he, Hyslop and Hogg put it at one minute. He further said that the vessels had moved from one mile apart to one-half, during the period he was under this initial helm. If the angle was thirty-nine and one-quarter degrees, the distance covered by

the Pomaron while the distance apart decreased from one mile to one-half was fourteen hundred feet which she would cover in about one minute and a half. Again, consider that although Hyslop, who best knew, says that the helm was not steadied, the total change in direction was only one point. It is hardly possible that a vessel of the Pomaron's size should travel over ten lengths under any change of helm at all and make no more change than one point. The surest way to judge of this is, not to take the witness' estimate of time or distance, but to consider the situation: The Alleghany's chief officer heard the Pomaron's signal in the chart-room and at once ran out; he was alarmed by it and its discovery of him off duty. We must assume that he used all possible haste and took no long time to determine what he would do; the occasion permitted no reflection. When he decided, he answered by two long blasts and put over his wheel. To suppose that this took more than a minute appears to me extremely unlikely and unreasonable; to assume it took a full minute is indeed doubtful. That it should have seemed a long time to Westgarth and Hyslop is reasonable, while they were being forced to hold that most trying of positions, a holding-on ship's, while the giving-way ship continues on her course and speed closer and closer. Therefore I find the shorter estimate to be the correct one.

The question still remains whether the Pomaron can show that this initial porting could not have produced the collision. In order to know this we must ascertain what actually happened after the Alleghany blew and

put over her helm hard-a-starboard. I think it must be conceded that the Alleghany's story is true that the helm was put hard over substantially at the same time as the whistle was blown; to suppose any real delay is impossible and no one suggests it. The speed was, if anything, increased for the telegraph was twice put full speed ahead. Moreover, we know from Westgarth —and there is no reason to suspect it,—that the Alleghany, when struck, had starboarded not more than three or three and a half points. Westgarth puts her at southeast by south. If so, her stern had not yet left her course and she had not at most travelled more than three lengths or nine hundred and thirty feet in "advance". At her speed she would travel one thousand one hundred and sixty-five feet in a minute and we may safely say, even allowing for her diminution of speed from her helm that she could not have been travelling over a minute from the time her helm went over.

Now the result of this is necessarily entirely to discredit the estimate of time of Westgarth, Johnson and Hyslop, and rather to credit the captain of the Alleghany who says that Westgarth put his telegraph full speed astern only when within hail. That there could have been anything like four minutes between the Alleghany's whistle and the collision seems to me so demonstrably untrue that I have no trouble in disregarding the testimony. The result is absurd, unless we suppose that after blowing the Alleghany kept her helm amidships for three minutes. Even if we suppose that the Alleghany changed her course more than Westgarth says it does not help matters, for if the Alleghany was

running for four minutes under a hard-a-starboard helm, she would move four thousand six hundred and sixty feet. To be sure her helm would check her speed, but if her speed only averaged seventy per cent of 11.5 knots she would have travelled three thousand two hundred and sixty feet; and she would have turned through eight points and have been on parallel courses with the Pomaron in an "advance" of four lengths or only one thousand two hundred and forty feet, or before she reached the Pomaron's course. Again we must remember that even if it took four minutes for the ships to come into collision the Pomaron was not over two thousand feet away, and if the Alleghany was anything like four thousand six hundred and sixty feet away at the time it was a simple thing for her to port under the Pomaron's stern as the rule requires. We must suppose that she was at once near enough to make that manoeuvre seem impossible and yet that the Pomaron was so near as to make starboarding in fact impossible. We must also remember that the collision happened not far from the intersection of the courses, as I shall show.

Now it may be thought that this does violence to the testimony, but remember that there is some testimony to the contrary, and also that Westgarth's first time estimate of the original porting was absurd. His own and Hyslop's estimate of four minutes I should not have the least compunction in disregarding, were it not for Johnson's corroboration said to be taken from the clock. As to that, moreover, I am encouraged to disregard it, because it is clearly only approximate any

way. The shock was "about" 11:24. I was reversed "five" minutes. It takes "four" minutes to stop—though the Pomaron was by no means stopped. "I might easily have been out half a minute or three-quarters", because I saw the hands at an angle (one minute is quite within the possibilities). "Three" minutes is the usual rule for stopping. "Four" minutes is about near it. All this does not indicate an exact observation and I don't believe that he ever made one. It may have been thought important for the Pomaron to get as much way off as possible, and the witnesses moreover were corroborated in their natural bias, by what to the men on deck must have seemed the interminable period during which the ships were in extremis.

Consider next the actual manoeuvre of the Pomaron. She was under a hard-a-starboard helm for the first half minute—the time it took to get the engines reversed. She had, therefore, with unchecked speed, travelled over four hundred and fifty feet, or nearly two lengths; during that time, her way being on, she had already swung nearly two points to starboard, before the screw was reversed. Thereafter under a reverse she would continue to swing to starboard though more slowly than if the engines were still ahead. Mr. Kneeland has cited from Knight the case where the engines are reversed at the same time that the helm is put hard over; he did not observe that "If the ship had actually begun to swing in obedience to a hard-over helm before the screw is reversed, she will in most cases continue to swing in the same way in spite

of the screw, although much less rapidly than if the screw were not reversed''. How was it possible for the Pomaron to keep swinging to starboard for three and a half minutes more and still gain nothing to starboard beyond the two points she had made before the screw was reversed, for we must remember that she was headed about east southeast when she collided. As I view the collision, therefore, it occurred very much sooner after the Alleghany blew than four minutes, probably not over one minute after that time, certainly not two.

Having fixed the time of the manoeuvres we must next fix the positions of the vessels at the time of collision. As I have shown: the Alleghany's stern was still on her original course and she was at an angle of not more than three or three and a half points from it. As the collision occurred about one hundred feet from the stern we can easily calculate that the place of collision was somewhere about sixty feet to the east of the Alleghany's course. We can also tell how far to the south of the Pomaron's course the collision occurred if we assume that the Pomaron's stern was still dragging along her course; it would be about one hundred and sixty-five feet. To assume that the Pomaron's stern had not left the course is to assume that in this respect the vessel would have acted as if all the change of heading had been produced by a hard-over helm. As to this Knight says ''In this case'', where a small angle of helm is used, ''also, the stern is thrown off and for some time the body of the ship moves along a line to leeway of the original course''.

When the helm is hard over we know that the "some time" is two or three lengths and until the vessel has changed more than three points. There are, as far as I have found, no results of experiments with helms slightly over, but I think it fair to assume from the results set out by Knight that in about three lengths and with a change of only one point, the stern would not have left the course.

Another consideration corroborates this conclusion as to the distance to the south of the Pomaron's course that the collision must have occurred. The Alleghany's bow must have been at least two lengths away from the point of intersection when the helm was put over, because the Pomaron must have been at least six hundred feet away herself and the situation was such that the Pomaron could still suppose the Alleghany could cross under her stern. If so, the stern of the Alleghany was three lengths away and could not have much more than passed that point when the collision occurred, because if so the ship would have turned more than three and one-half points, a turn she will make in not more than three lengths. If so, the collision was not much to the south of the Pomaron's course, which is just where it ought to be if the Pomaron's stern had not yet left her own course.

If we assume that the stern of the Pomaron remained upon her old course till collision, that she headed east southeast, that the stern of the Alleghany remained on her course, that she headed southeast by south and that she was struck one hundred feet forward of her stern we can exactly find how far her stern was from the

intersection of the two courses; it was seventy-six feet. If we then assume that the Pomaron had not originally ported, but had in extremis done precisely as she did do, we can find at what part her bow would have crossed the course of the Alleghany; it would have been one hundred and twenty-seven feet from the intersection of the courses. If we assume therefore that the Pomaron's bow would have reached the course at the moment of the collision a collision was inevitable, even with an allowance of fifty feet. However, this assumes that the Pomaron changed her heading, but not her course, and there may be a question of this. All we certainly know is that when so much change of heading occurs under a hard-over helm the stern does not leave the course. We cannot know whether under the slight helm for the first minute the Pomaron may not have changed the course or "drift" of the ship. All we can say is that if she did change it at all, it was less than the one point change in her heading, because a turning ship always heads in upon the course she is at any given moment following. However, a very small change in her course would fix the collision at a place where the Pomaron's bow would have swung clear, had there been no original porting. Thus if the angle of drift had been only five degrees with original course when the Pomaron hard-a-ported, nevertheless she need have travelled only about five hundred and fifty feet to place the Alleghany's stern beyond the sweep of the Pomaron's bow. Indeed if the change of course were only three degrees or one-quarter of a point she need only travel about nine hundred and ten feet, or during

the first minute after the telegraph was set full speed astern. It is plain enough that a very slight variation in her drift caused by the first porting might have made the difference between collision and safety.

However, it may be said that this is unfair because the time at which the Pomaron's bow would have entered the course of the Alleghany's stern was earlier than the moment of collision and that therefore the Alleghany must be put back further on her course. It is true that the bow of the Pomaron had to travel about sixty-five feet to the east of the Alleghany's course to come into collision but even if the Pomaron was travelling then at only seven knots per minute, it would have taken her less than six seconds to do this during which time the Alleghany would move only about one hundred feet. Besides this we must remember that the course of the Pomaron's bow to the Alleghany's course after she ported was more nearly at right angles than if she had not ported which means that her bow took a little shorter time to reach the Alleghany's course than it would otherwise have done. This difference if the actual distance to the Alleghany's course was nine hundred and twelve feet, i. e., if it took one minute to reach it, is about fifty feet which very nearly equals the distance to the east of the Alleghany's course which the bow had to go to get into collision.

Now it must be apparent to any candid person that when the Pomaron has the burden of proof all such calculations are the merest of speculation. I have followed them out,—and an immense deal more,—with a quite disproportionate expense of time in the hopes

of finding some adequate ground for exonerating the Pomaron, a result which my sense of justice very greatly impels me to accomplish. It seems to me most unjust to hold that this ship should bear this loss, but although I have tried in every way I could think of to prove that the initial porting could not have contributed to the collision, my final conclusion is that absolutely no certainty whatever is possible and that the exact facts have forever disappeared in the fleeting situation which has left no permanent memorial. If a ship which violates a rule becomes the guarantor of such proof, she must usually suffer. I do not weigh for a moment Westgarth's testimony that the initial porting made no difference.

The last question is of the Pomaron's manoeuvres in extremis. It seems to me reasonably clear that, had Westgarth starboarded, he would have cleared the Alleghany. Such a manoeuvre, even after the initial porting, would have probably thrown his bow off to port far enough to clear, and although the sterns might have collided, it is not likely. Had he held his course till the Alleghany blew and then hard-a-starboarded, this would have been more certain. However, it does not follow that he should be held at fault for a wrong choice in extremis. Knight, page 258, does not recommend the manoeuvre unless collision is inevitable and then only because it presents the holding-on vessel's bow to the danger, a failure to do which hardly lies as a complaint in the mouths of these libellants. He recommends that a holding-on vessel in this position port and keep her speed, but adds that it is a situation

for which no hard and fast rule is applicable. It seems to me to be well within the rule in extremis. It must be remembered that for each vessel to move off from the other, as actually happened, made the courses converge and decreased the seriousness of the resulting collision in proportion. To starboard was to insure that if any collision did occur, it would be at right angles or near it. After figuring it out, I may now conclude that a hard-a-starboard helm would have saved the day, but Westgarth had no means for such a calculation and was suddenly confronted with the very worst manoeuvre which his adversary could execute. He did the thing usually best and I will not therefore hold him for not starboarding.

The next question is of the Pomaron's failure to keep her speed. In the first place I do not think this had much to do with the collision in any event. If it took the Pomaron half a minute to reverse her engines, there could have been very little chance for a very marked change of speed. We may, however, suppose that the Pomaron's speed was reduced to seven or eight knots an hour; this was an advantage, but played no great part. Was it a wrong manoeuvre in any event? It appears to be well settled that a vessel which ports should keep her speed, if she means to get away altogether, Knight, page 356. This is true for two reasons, first because she turns in a much shorter compass when her movement is not contradicted by her screw, and second, because she passes more quickly out of the course of the other vessel. Had Westgarth any opportunity to clear the Alleghany this would have

been his best manoeuvre, though it would not necessarily have been fair to charge him for failing *in extremis* to choose the best. If, on the other hand, he had no chance to escape at all, as he certainly had not under a port helm, he did what was best because he tried to lessen the shock of collision, and he kept his own boat afloat and at least improved the chances of the Alleghany. It is true that the angle of collision might have been less and the blow more glancing, but it is a question whether this would have made up for the greater speed. At least he could not have crossed her bows, which is what the manoeuvre requires, and he was surely not to blame for refusing to expose his side.

The necessary conclusion is that the Pomaron must be held for Westgarth's original porting, under the rule in the Pennsylvania, 19 Wall. 125, and the Agra, L. R. 1 P. C. 501. The time had not yet come when he needed to act alone, and his action was not in extremis; it was to assist the other vessel to accomplish her duty. I have already said that the result seems to me extremely inequitable and I should be glad if an appellate court could find otherwise, but while the holding-on ship is charged with the burden of proof, I can see no alternative. The case is one which shows the necessity for the proposed new rule which will not hold each ship in solido, but will apportion liability according to fault. Had that been open to me, I should have attributed a very small fraction of blame indeed to the Pomaron. As it is, under what I cannot help calling a very mechanical and arbitrary rule of law, I see no

escape from assessing this ship with the full loss for a trifling violation of the rule, for it remains true, however we may regret the result, that only unfounded speculation can justify us in saying that the violation could not have produced the collision. The only evidence which we have is necessarily wholly approximate and inexact; we should not treat it as the foundation for mathematical calculations without making large allowances, more than fifty or one hundred feet. The whole problem seems to me to come down to this; whether I should loyally apply the harsh rules as I find them to the evidence, or should try to mitigate their injustice by an appearance of certainty in deduction from shifty and unreliable data.

The libellants will take the usual decrees.